

Cable Car Advertisers, Inc. d/b/a Cable Car Charters and Freight Checkers, Clerical Employees & Helpers Local 856, International Brotherhood of Teamsters, AFL-CIO and Sheila Lambert. Cases 20-CA-25377 and 20-CA-25789

October 15, 1997

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On June 24, 1997, Administrative Law Judge William L. Schmidt issued the attached supplemental decision. The Charging Party filed exceptions and a supporting brief.

The National Labor Relations Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.²

ORDER

The recommended Order of the administrative law judge is adopted and the surveillance allegation in complaint paragraph 12 is dismissed.

¹ The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In adopting the judge's recommendation to dismiss the surveillance allegation, we rely on his finding that handbillers had been observed obstructing access to the Respondent's ticket window and boarding its tour cars to approach customers who had already bought tickets, and that the Respondent did not begin its surveillance until after it had received reports of such incidents. See *Concord Metal, Inc.*, 295 NLRB 912, 921 (1989) (finding an employer's photographing of picket line to be lawful where pickets had blocked an entrance and employer sought to preserve evidence for possible legal action). We also find it unnecessary to reach the issue of whether the various types of conduct described in his decision were unprotected or unlawful.

Eugene Tom and Richard Fiol, Esqs., for the General Counsel.

Michael P. Merrill, Esq. (Merrill, Arnone & Handelman), of Santa Rosa, California, and *Messrs. Arnold Gridley, Robert Gridley, and Robert Sullivan*, of San Francisco, California, for the Respondent.

David A. Rosenfeld, Esq. and Mr. Jonathan Palewicz, of San Francisco, California, for the Charging Party, Local 856. *Mr. Michael Buckey*, of San Francisco, California, for the Charging Party, Sheila Lambert.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. On November 21, 1996, the Board issued its decision in *Cable Car Charters*, 322 NLRB 554 (1996). In that decision, the Board declined to adopt my recommendation to dismiss the complaint's surveillance allegations. Instead, the Board severed the surveillance allegation and remanded it to me "to make the necessary credibility resolutions." I then invited the parties to brief the remanded matter. General Counsel, Respondent and Teamsters Local 856 each submitted a brief. After again carefully considering the record and the parties' briefs on this limited issue, I now make the following:

SUPPLEMENTARY FINDINGS OF FACT

I. THE SCOPE OF THE REMAND AND THE ARGUMENT

The Board found that "[i]t is undisputed that the Respondent photographed and videotaped employees engaged in handbilling on behalf of the Union and that it maintained a written record of names and dates that employees engaged in handbilling." Furthermore, the Board noted "[t]he Respondent contends that its surveillance was necessitated by employee misconduct." In its remand order, the Board directed me "to make credibility determinations regarding when the surveillance began, whether employee misconduct occurred and, if so, when the misconduct took place, and whether Respondent was aware of the misconduct when it ordered the surveillance." The complaint allegation at issue pertains to Respondent's surveillance of employees by photographing their boycott activities at Respondent's pier 41 facility in San Francisco.¹

The General Counsel now asserts that "the record supports a finding that Respondent's photographing and videotaping took place from the very inception of the handbilling, July 2, through its conclusion in December."² In support of this assertion, General Counsel claims that the testimony of three employees—Randy Morrison, Kohle Gleffe, and Fred McKenzie—mutually corroborate one another and establish that the photographing and videotaping commenced in early July. In addition, the General Counsel argues that Respondent's failure to either admit or deny that it photographed and videotaped employees in July warrants an adverse inference that such activity, in fact, occurred in July. That inference, taken together with the testimony of Morrison, Gleffe, and McKenzie, merits the conclusion, the General Counsel asserts, that the record "amply supports a finding that the photographic and videotaping surveillance began in July." As for misconduct by the handbillers, the General Counsel argues, in effect, that none occurred but even if some misconduct did occur, it did not happen until after July or August. For these reasons, the General Counsel argues

¹ Specifically, the allegation (complaint par. 12) reads: "On various dates in July, August and September 1993, Respondent, by Hoa Van and Ty Van, by Respondent's pier 41 facility, engaged in surveillance of Respondent's employees' union activities, by photographing those activities."

² All dates in this supplemental decision refer to the 1993 calendar year. The boycott and handbilling at pier 41 commenced on July 2.

that the photographic and video surveillance at the outset was unlawful.

Local 856 argues that “there was no employee misconduct” and, hence, no surveillance was justified. Accordingly, Local 856 urges that I find the Respondent’s efforts to maintain a written and photographic record of activities at pier 41 unlawful.

Respondent now contends that “the initial determination that the close proximity of the employees engaging in concerted activities with other employees performing services for the company . . . was an ample factual finding to support the legal conclusion that [it] had reason to believe that conflict would arise” and, therefore, its efforts to keep a written and photographic record was permissible under the language in *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). In addition, Respondent argues that Michael Van’s testimony establishes the boycotters blocked customer access to its ticket window at the pier 41 ticket car throughout the month of July, and that this information was communicated to Respondent’s management. In addition, based on the testimony of employee Bill Mar, Respondent claims that certain boycotters verbally abused its customers at Pier 41 throughout the summer of 1993. Finally, Respondent argues that it maintained its written and photographic record on “advice of counsel to be used in the pursuit of later injunctive relief.” Accordingly, based on the Board’s decision in *Concord Metal, Inc.*, 295 NLRB 912, 921 (1989), Respondent believes that its written and visual record concerning the boycotters conduct at pier 41 was justified.

II. THE SETTING OF THE BOYCOTT ACTIVITIES

Originally, I concluded, in effect, that it was unnecessary to determine precisely when Respondent commenced its written and pictorial record keeping vis-a-vis misconduct by the union’s leafleters. Because of “the handbillers’ and the ticket sellers’ access to potential customers occurred in the same restricted space at the same time” I concluded that Respondent’s effort to maintain a written and pictorial record was justified.

Respondent’s Exhibit 28—the only one of the disputed videotapes in evidence—amply displays the physical setup of Respondent’s pier 41 operation and the proximity of the employees engaged in boycott activities on behalf of the Union, the Respondent’s employees engaged in their normal work activities at that location and the potential customers passing through that area.³ As indicated in my original decision, Respondent, in effect, obtained a license from the San Francisco Port Authority as a vendor at pier 41 to solicit tourists for sightseeing trips on its faux cable cars.⁴

The pier 41 area allocated to Respondent amounted to slightly over 90 feet of curb space adjacent to a sidewalk which is about eight feet wide. The sidewalk is bounded on the side opposite the curb by a low fence constructed of wooden pier piling sections connected with heavy anchor chain. The sidewalk in this area is one of the principal routes

of walking traffic in the Fisherman’s Wharf area which attracts considerable tourist traffic. With the cable cars on one side and the fence on the other, the sidewalk through the area involved amounted to what one witness called a “corridor.” Respondent’s pier 41 business efforts occurred primarily along this corridor.

In pursuit of this business, Respondent outfitted one of its cable cars as a ticket car. Each day that car would be driven from its car barn to pier 41 where it would remain parked at curbside throughout the day’s operation. As a rule, Respondent posted one employee in the ticket car to conduct business with customers who approached the ticket window to purchase tour tickets. In addition, one or more roving ticket sellers walked along the adjacent sidewalk soliciting tour customers. Two of Respondent’s regular cable cars parked behind the ticket car for use on the tours. When enough customers purchased tour tickets, the full car would be dispatched and another car would be called to take its place.

As depicted by the videotape in evidence, Respondent in effect conducted a retail operation at pier 41 entirely in the public sphere as opposed to the usual retail operation typically conducted within the confines of a leased or owned space. In essence, everyone from the general public to the boycotters would be entitled to access to the general area of Respondent’s pier 41 operation. For purposes of this decision, however, I have presumed and I find that only on-duty employees and members of the public licensed by Respondent through the purchase of a ticket would be entitled to actually board Respondent’s cable cars.

III. BOYCOTT MISCONDUCT AND RESPONDENT’S KNOWLEDGE

A. The Pertinent Evidence

Michael Van regularly worked as the ticket car ticket seller throughout the period of the boycott activities at pier 41. As Respondent noted in its remand brief, Michael Van claimed that some of the leafleters blocked the customers’ access to the ticket window. In addition, Michael Van testified concerning ugly racial references which two of the boycotters made about him to customers at the ticket window. Specifically, Michael Van testified as follows:

Q. If you have a specific recollection of something that was said to you, I’d like to hear that.

A. Yeah. There was one time about a week before the—the week after the leaflet thing down there—

Q. Was this the week after it started?

A. Yeah. And Randy Morrison told—there was this black gentleman walking to my window, and he said that, “You won’t want to buy a ticket from him because he’s a racist. He don’t like black people.”

Q. And what did the customer do?

A. The customer went on the tour anyway.

Q. Do you have any other recollections where you can remember specific things that were said to a customer in front of you, or that were said to you by any of the individuals that you knew in the company that you could identify?

A. There was Will Segen. He told a customer, “You won’t want to buy your ticket from this guy, right here.” And he would say—talk about the Asian, say

³Originally, I received this videotape exhibit for the limited purpose of demonstrating the nature of certain claimed misconduct. In view of its general depiction of the scene at pier 41, I now receive that exhibit without qualification.

⁴By the time of the hearing, the Port Authority had awarded this pier 41 vendor license to a competitor of Respondent.

that their eyes are small and when I stare out, he said, "Are your eyes open?"

Q. Is this what he said to you?

A. Yeah.

Q. And where were you when Mr. Segen said this to you?

A. I was in the ticket booth.

Q. And you were selling tickets, attempting to sell tickets to customers at that time?

A. Yes, sir.

Q. Did the individuals that you described in any way block or attempt to block customers from getting to your ticket booth?

A. Before the injunction was put into place, there was three of—about three of them around the ticket booth, and some—

Q. And when you say around the ticket booth, tell us how they were around the ticket booth.

A. Like they were right next to the window which is about one foot [sic] away, and the other one was right in front of me.

Q. And what were they doing?

A. They were trying to stop customers from coming to the window.

Q. How would they do that?

A. They will either—they will stop, pass out the pamphlet, and tell them that to go down to another company.

Q. And were they standing in front of the booth so the customer couldn't get to the window?

A. Yes, sir.

Q. And do you remember—could you identify who these individuals were that were doing this, or any of them?

A. Yes, sir.

Q. And who were those individuals that you saw doing that particular activity?

A. It was Will Segen, Dan Callahan, Randy Morrison, and there was some other people that didn't work with this company.

Q. Other people that worked with the company or didn't work with the company?

A. Didn't work with the company.

Brendan Travers, a company driver, described activities by the individuals engaged in the pier 41 boycott activities. Thus, he testified:

Q. And if you can remember, you know, specific incidents and specific individual's conduct, you know, we'd like to hear that.

A. Well, it—as I said, it started off pretty gentle, but then it became people were obstructed getting on the cable cars.

Q. How did that happen, and what would somebody do to obstruct an individual from getting on to the cable car?

A. The person that was selling the tickets, in the process of selling the tickets, some of the picketers would get in behind them, or very close, and obstruct it, or try to, try and say something as the process was going on.

Q. Would they attempt—are you saying they would attempt to get in between the people who was selling the tickets and the customer?

A. Yes.

Q. And they'd physically sort of force themselves in that position?

A. I'm not going to say they physically did it, but they did it in such a way that it made the people that were buying the tickets aware there was something going on, and it made it uncomfortable for them, and it was certainly—I'm not going to say they—nobody pushed anyone or did anything like that, but it made it very uncomfortable for the people and they were aware what was going on.

Q. Did it appear from time to time that the—the ticketers [sic] were actually, you know, trying to prevent people physically from getting onto the cars?

A. I haven't seen them actually physically try to stop anyone. It was just a matter of when they'd be getting the tickets, the ticket seller would be trying to sell it to them. They'd be kind of hovering around, maybe moving in front, or making them aware that they were there, and even saying things over the voice of the ticket seller in such a way they'd hear it. It's very close, and blocking the cable cars sometimes.

On cross-examination, Michael Van testified that these incidents started in July. He further testified that he informed Hoa and Ty Van, Christine Bennett, and John Mozol about these incidents.⁵ Travers testified that the leafleters activities at pier 41 began peacefully but after a couple of days the conduct changed.

Randy Morrison flatly denied that he made the racial slur attributed to him by Michael Van. Will Segen denied that he made an "anti-asian" remark to Michael Van but acknowledged that he had told Van that he should open his eyes or that his eyes were not open. Segen claims that he made such remarks to Michael Van on one occasion when it appeared as though Van was or had been sleeping at the ticket car window.

Arnold Gridley claimed that he received similar reports from the car barn about the conduct of the leafleters over the July 4th weekend. He testified:

The car barn called me and said that they were blocking the ticket sales. That the ticket sellers could not sell any tickets, the people that were trying to board the car were interfered with, and the picketers were screaming and hollering and telling all the people that the cars were unsafe and that they should not get on these cable

⁵Michael Van is the nephew of Respondent's barn supervisors Hoa and Ty Van. At the time of the hearing, he lived with Hoa and Ty. I presume that he too is a Vietnamese immigrant or the son of recent immigrants. Although Michael Van's command of the English language was far superior to that of his aunt and uncle, his syntax was not on a par with most native speakers. For this reason, I am not disturbed by counsel's use of a limited number of leading question during his direct examination of Michael Van. In my original decision, I found John Mozol to be a nonsupervisory barn employee who was terminated prior to the commencement of the boycott activities on July 2. Therefore, I conclude that Michael Van's recollection about informing Mozol of these incidents is simply mistaken.

cars, that they should go down to Pier 39 and board their cable cars down there. They even said that they'd give them the difference in the money to go down there. But on the overall picture police had to be called. It was really something like—I just—it's hard to portray how boisterous, how loud the screaming, and people stopping the people from walking on the sidewalk. The people were afraid of the screams and hollering and the bad language that was being used there, and it interfered about, I would say, 60 percent of our business, or 70 percent, on the 4th of July there—was taking place because of all of the strong activity that was going on there.

Arnold Gridley claims that he went to pier 41 when he received this report and observed this activity first hand. On cross-examination, he provided this further detail:⁶

Q. I see. Now, you say that you went down to Pier 41 on the July 4th weekend and you observed various things taking place. Did you yourself observe the ticket cars being blocked on that occasion?

A. Yes, I did.

Q. How many times did that happen on that occasion that you observed this activity at Pier 41 on the July 4th weekend? Was it all day or—

A. I wasn't there all day. I was there for two or three hours, and then I came back and I was there again. And I was on the radio all the time. They were keeping me informed of everything that was going on.

Q. Who was it who was keeping you informed on the radio?

A. Two or three different people at that time. Ms. Hoa happened to be one, her husband another one—

Q. That's Ty Van?

A.—then there was some other one down there that was there at the time. And they were all keeping me informed of what was happening.

Q. I see. I'm sorry, I didn't quite hear an answer from you, Mr. Gridley. Was Ty Van one of these people who was keeping you informed, Hoa Van's husband?

A. That's correct.

Q. All right. And the third person, do you recall now who that person was?

A. Patrick Nolan was a person that I believe gave us a call. Another lady in my office, Debra Daniels, I be-

lieve, was there at the time and was helping out in the situation.

Q. I see. And you say that you actually saw on this occasion, the July 4th weekend, passengers or potential customers actually being interfered with?

A. That is correct.

Q. You saw this yourself?

A. I did.

Q. Plain as day?

A. That is correct.

Q. How many times did that happen, many times or just one time?

A. This happened on many occasions.

Q. Many occasions.

A. Like an ongoing basis for quite awhile. The leafleters were pretty stirred up and were acting very boisterous, very demanding, very commanding, like storm troopers. I couldn't believe the actions that they were going through and I hadn't seen—I hadn't been around strike cases to any extent over the years, but after the way we've treated all of these people and to come down there knowing that this was our busy season and everything—if they had a leaflet like I guess they say they do, passing out pamphlets and things like that, it wouldn't have had any—we wouldn't have had any problems. But to come in and scream and holler and get over and keep people from getting on the car, walking into the car and telling the people, "This car's not safe. Get off and go up the street to Pier 39 and get on the cars." They would walk right inside the car. It was so unusual. I couldn't believe that these people had worked for me or were working for me in the past.

Q. These were things that you personally saw?

A. That is correct.

Q. I see. Now, did you do anything in response when you saw and heard these people doing these things on the July 4th weekend?

A. I called the police on at least two or three occasions.

Q. I see.

A. We called and got security people. Mr. Ongisto supplied us some people. And it didn't do any good.

Q. Why do you say it didn't do any good?

A. The—

Q. I take it you're speaking of the security people?

A. The security people.

Q. I see. Why didn't it do any good?

A. They said there are only certain things that they could do and they couldn't restrain them when they were doing a lot of things. They could walk over close to them and tell them to move on or something, but if they wanted to push it too hard, why, they didn't have the authority to really—to slow them down or stop them.

Q. How long did you have the security people out there?

A. They were on and off there for quite awhile. I'm not just sure how long it was.

Q. I see. Did you ever do anything else in response when you saw these things taking place at Pier 41?

A. I believe some companies—somebody called us and said they wanted to take some pictures, and I be-

⁶Certain observations are in order concerning the following testimony by Arnold Gridley. First, I presume the transcript reference to "Mr. Ongisto" actually refers to former San Francisco Police Chief Hongisto who now operates a private security firm. There is general agreement that Respondent posted security guards at pier 41 for a period of time. Second, I find it very likely that Gridley confused reports purportedly received from Philip Nolan and Debra Daniels over that July 4th weekend with reports at a later date. Neither of those two individuals were employed by Respondent at that time. Third, in my original decision I characterized the "storm trooper" reference in this portion of Gridley's testimony as an obvious exaggeration. I remain of that view even though, for reasons explained below, I credit some portions of this section of Gridley's testimony as it is consistent with other witnesses I regard as reliable, including Michael Van, Steven Vogel, Brendan Travers, and Henry Schaeffer.

lieve one or two companies came down there and took some photos of the actions going on at least two occasions that I know of.

Q. All right. Did you report the things that you saw to the Littler Mendelson attorneys?

A. Yes, I did.

Q. And, now, they were still representing you and the company during this period of time, weren't they?

A. I'm not sure—I can't recall whether Mendelson was in on it on July weekend or not. I really can't recall.

Q. I see. But the Littler Mendelson firm had been representing you during the election that took place the month before, isn't that correct?

A. That's correct. Now my memory's—

Q. So the Littler Mendelson firm was still representing the company at that time?

A. That's correct. That's correct.

Steve Vogel, the regular roving ticket seller also alluded to leafleters blocking customer access to the ticket car window but he gave no indication as to when the type of activity he describes below occurred. His testimony on this point is as follows:

Q. During this same period of time, did you have occasion or did you ever observe any situations where the individuals that were there giving forth this information for the union would physically impede customers from getting on to a cable car or approaching the ticket seller or anything of that nature?

A. They—my end of the space that we had, about four parking spaces altogether, I was free to roam around, but I, by and large, would stay on my end of the area. At the ticket car, the employees that would not come down to me, there was several of them that would not want to do battle with me, let's say, and they just wanted to stay away from that end because it was more highly charged, by and large, and they would stay on the other end. Kent Bishop and Fred McKenzie and Michael Buckey stayed on the far end of the Wharf area, and Dan Callahan and Will Segen and Sheila Lambert would stand in front of the ticket car window so that potential customers would have to fact [sic] them first before even reaching the ticket window which is just a mere two feet behind them. And for my part, the people on my end would simply, as the tourists would come up, they would try to put their back to the tourists so that the tourists could not get anywhere else, and one of their members could stand on the other side and make sure that their information was being forwarded just as quickly as mine. And for a tourist environment, tourists' attention is very short, and if they're going to spend money, they do not want to be hassled or pushed or forced to do anything of any sort.

Henry Schaeffer testified that he observed leafleters boarding the cars to approach customers who had already purchased tickets in order to press their boycott appeal. In some instances, Schaeffer asserted, the customers left the car to seek a refund of their ticket money. Schaeffer provided no indication as to when these activities occurred.

Although he made no effort to imply that he had personally observed the pier 41 activities over the July 4th weekend, Robert Gridley testified that he received reports that the leafleters obstructed access to the pier 41 ticket car over the July 4th weekend from Hoa Van and that he instructed her to keep the Company's attorneys informed about these activities.⁷ Scott Rechtschaffen, the Company's attorney at the time, also testified that he received reports in the first week of July about "leafletting, picketing, yelling at potential customers and customers, various trespassing onto...the buses or the coaches, people surrounding the ticket selling area, activity of that nature" at the Company's pier 41 operation.

The Respondent obtained a state court injunction pertaining to the boycotters activities in mid-October. The specific terms of this order are unknown but it obviously related to boycott activities in the immediate vicinity of the ticket car and the tour cars. Thus, Michael Van noted that the leafleters no longer stood at the ticket window after the injunction issued. Steve Vogel alluded to a requirement that the leafleters remain at a "safe" distance. Robert Sullivan claims that the boycott tactics changed. He claims that after the injunction issued, the leafleters approached customers in the adjacent parking lots rather than in the immediate vicinity of the cable cars.

B. Conclusions

Based primarily on the foregoing testimonial samples, I have concluded that Respondent presented corroborated evidence that some of the handbillers impeded customers' access to the ticket window at the ticket car by physically positioning themselves in front of the ticket window and that in certain instances handbillers boarded the tour cars without Respondent's authorization to continue their boycott appeal with passengers who already purchased tickets. I further find that Respondent presented evidence that this type of activity occurred over the July 4th weekend. I credit this evidence. In this connection, Respondent presented a consistent strain of evidence concerning the nature and the timing of this misconduct which ran from Michael Van at the ticket window on pier 41 to Scott Rechtschaffen's office suite at the Littler, Mendelson, Fastiff, and Tichy law firm and which I find convincing.

The unusual setting of Respondent's activities requires, in my judgment, some reasonable accommodation between Respondent's right to engage in its business and the Union's right to present its appeal to the public. I fail to see how that balance could be accomplished if customers do not have free access to engage a business enterprise for a business transaction. Apparently, the state court thought likewise here. I therefore find that in certain instances some of the handbillers engaged in misconduct over the July 4th weekend by impeding customer access to the pier 41 ticket window, and by boarding the tour cars without authorization in an effort to persuade Respondent's customers to abandon their decision to take Respondent's tours. This latter conduct in a more normal retail setting would be functionally equivalent to tolerating off-duty employees roaming throughout a retail

⁷ As indicated in my original decision, Robert Gridley had by this time returned to directly oversee his own business interests in Louisville, Kentucky. Gridley returned to San Francisco to again assist his father around August 1.

store imploring customers to return their purchases for a refund.

Notwithstanding the protected nature of the boycott activities at pier 41 in general, I have concluded that certain other conduct became so abusive as to lose its protection under the Act. See generally *NLRB v. City Disposal Systems*, 465 U.S. 822, 837 (1984). Specifically, I credit Michael Van's testimony regarding the racial slurs and innuendo directed toward him in the presence of customers. The remarks which Van attributes to Randy Morrison were obviously made in an effort to dissuade customers from dealing with Van but those remarks, in my judgment, cross over the line dividing spirited consumer appeals from sleazy racial smears. The remarks which Van attributes to Segen are even worse as they lack the slightest connection to the protected boycott activities and would be good cause for severe disciplinary action in any ordinary workplace setting. In light of the other activities and the general atmosphere described over the July 4th weekend, I further find that it is reasonable to conclude that this conduct most likely occurred at or about that same time. Accordingly, I further find that this evidence reflects misconduct on the part of handbillers Randy Morrison and Will Segen in particular.

IV. RESPONDENT'S WRITTEN AND PICTORIAL RECORDKEEPING

A. The Pertinent Evidence

No dispute exists about the written record Respondent kept showing the names of the employees who handbilled at pier 41. Respondent entered those handwritten notes (or at least a large portion of them) in the record. (R. Exh. 13.) That exhibit indicates that the recording of names began on July 2. Robert Sullivan testified that he directed this activity as well as the photographing and videotaping at the suggestion of Respondent's legal counsel. There is no evidence one way or the other as to whether these materials were eventually used by Respondent when it actually sought the state court injunction.

The evidence about Respondent's photographing and videotaping activities is much more problematic. The evidence on this critical point suffers from cloudy vagueness where it exists at all. General Counsel questioned virtually every witness about the photographing and videotaping but failed to pinpoint the start of these activities in the vast majority of instances.

Kohle Gleffe and Fred McKenzie, two witnesses whose testimony is cited by the General Counsel, both claim that the pictorial recordkeeping began early in the boycott. Thus, Gleffe testified that Lori Jones and Mike Gridley "came down and took some still photos and some videotape" and that this occurred "[i]n the early summer when we first started leafleting." Although Ty Van's written record (R. Exh. 13) reflects Gleffe's name on very few occasions, she would have been in a position to observe such activities while working as a ticket seller in the pier 41 ticket car. Gleffe further testified that Hoa Van and Patrick Nolan came to pier 41 "regularly every couple of weeks" to videotape and take still photos. However, these activities noted by Gleffe undoubtedly occurred in September as Nolan was not employed by Respondent until September 4.

McKenzie recalled that videotaping first occurred on July 24 or 25 when he first became involved in the pier 41 boycott activity. Respondent's Exhibit 13 reflects no handbillers names on that date. In that exhibit, McKenzie's name first appears on July 14 and then July 16.

The earliest specific date comes from Randy Morrison's testimony where he asserts that the photographing and videotaping began on July 5. I do not credit that claim as Morrison's account concerning his whereabouts and his activities on July 5 is laced with inconsistencies. As explained in footnote 23 of my initial decision, Morrison claimed during the General Counsel's case-in-chief that he was handbilling at Sabella's Restaurant when Ty Van appeared to close the shuttle operation on July 5. However, when General Counsel called him as a rebuttal witness, it became apparent that Morrison, in fact, was not handbilling but instead was working as the dispatcher at Sabella's on July 5. Entirely aside from the corroborating exhibits referred to in that footnote, a careful review of Respondent's Exhibit 13—Ty Van's daily record of the persons who handbilled at pier 41—fails to reflect that Morrison handbilled at pier 41 on July 5. For these reasons, and as Morrison impressed me while testifying as someone eager to paint Respondent in the worst possible light rather than carefully reflecting facts about matters which he saw and heard, I cannot rely on Morrison's claim that the picture taking and videotaping began as early as July 5, nor am I able to credit his more general claim that the picture taking and videotaping occurred throughout the pier 41 handbilling activities.

Jonathan Palewicz, clearly the most active union supporter among the employees at this time, testified that the photographing and videotaping occurred "almost the entire summer" but provided no information which would permit a specific conclusion as to when it began. By implication, however, Palewicz appears to agree that no photographing and videotaping occurred at least in the first few days of the boycott.

The most puzzling testimony of all on this point was provided by Michael Buckey who I regard generally as a very reliable witness. His testimony provided the most studied account about the picture taking and videotaping, and reflects the greatest detail combining the chronology and identity of those who engaged in the pictorial record keeping activity. As seen below, Buckey recollected that the videotaping first commenced "after Labor Day weekend." Thus he testified as follows:

Q. Now, on those occasions when you were at Pier 41 leafleting, did you ever see any members of management or anyone else from the company?

A. Yes.

Q. On what occasions, if you recall?

A. Every time actually because there would always be at least Ty down there—Ty Van—because he would be dispatching.

Q. Doing what? Or I'm sorry. Other than those occasion when you saw Ty Van at Pier 41 dispatching, did you ever see either Ty Van or anyone else from the company present while you were leafleting?

A. Yes.

Q. And what were these occasions and what did you see these members of management or people from the company doing?

A. One of the first times that I recall was the weekend, Saturday specifically, after Labor Day weekend. Karen Chiarenza, I believe we discussed her earlier from the office, was down there and she was taking pictures of us and—

Q. When you say “taking pictures,” what precisely did you see her doing?

A. Well, at the beginning, I believe, she was using a print camera, photo, snapshots. And then later there was a video camera that was brought out. Her son arrived two or three hours later, say roughly 2:00 o’clock.

Q. How did you know it was her son?

A. I have known Ken. He used to work as a ticket seller for a while with us. He was out there.

Q. Was he working for the company at that time?

[Intervening Objection]

THE WITNESS: I don’t believe so, and not in my knowledge, no. BY MR. TOM:

Q. And what is it you saw Karen Chiarenza and/or her son doing?

A. Taking pictures, videotaping those of us that were handing out leaflets. Every time we would talk to people walking by, they would come up and take video camera video shots of us.

Q. All right. Did you ever see anyone, other than Karen Chiarenza and her son, photographing or videotaping you while you were leafleting?

A. Yes, Phil Wright did one day and also Patrick Nolan. I didn’t --

Q. Who is Patrick Nolan?

A. Patrick Nolan, I only knew him by his first name at that point in time, Patrick. And I thought he had just been hired to be like an overseer or whatever at Fisher-man’s Wharf, down at Pier 41 at that point in time. I wasn’t really sure who he was. He had not been there when I was still working on the shuttle.

Q. All right. Did you later come to learn what his position was with the company?

A. Well, he was obviously a driver. I saw him on a car a couple times, driving a car. And it looked like he was doing some of the dispatch functions at Pier 41, routing people over where to buy tickets, tearing off ticket stubs on the passengers that were on the car on the tour, getting to leave and so on.

Q. Since then have you come to learn what his position is?

A. Yeah, he’s one of the barn managers.

Q. I see. Is Hoa Van still with the company in that—

A. Yes, he answers

Q.—capacity, as well?

A. He answers to her, yes.

Q. I see.

A. That’s my understanding. I believe that he is under her.

Q. All right. Do you recall if anyone else was ever at Pier 41 from the company videotaping or taking photographs of you while you were leafleting?

A. Mr. Gridley was down there on occasion, but not—he didn’t do the actual videotaping. He was down there specifically the day that Phil Wright was videotaping us. Hoa and Ty videotaped us, also. I believe that was on the following weekend after Karen Chiarenza did.

Q. All right. How many occasions do you recall seeing Hoa Van and Ty Van out at Pier 41 videotaping you?

A. Two days only. I think it was like the—it would be like mid—mid-September to the 20th, somewhere in there. The first weekend after Labor Day—I don’t know what date that would be—it would be Karen Chiarenza and Ken, her son. And then Ken continued to videotape us the next day on Sunday. The following weekend is when Mr. Gridley and Phil Wright were down there. Phil Wright did some videotaping of us. And then a month or so later—actually maybe only two or three weeks—but within the next month Ty and Hoa both were doing some videotaping and so was Patrick Nolan.

Q. All right. How long were Hoa Van and Ty Van videotaping you?

A. About two, two and a half hours. They came down around noon or so. I mean, they weren’t actually working at the Pier 41 facility. I remember seeing them. The van pulled up right by the ticket car. They unloaded the camera, and were packing the film into it, and videotaped us for a while and then the battery ran out is what happened, quite frankly, so you know, we were kidding them about, “Why did you stop filming? You know, we were just getting into it.” He said, well, he said something. I don’t know exactly what, but the battery was dead.

Q. Where were Hoa Van and Ty Van in relation to where you were leafleting?

A. I would actually go from different points. When I was—when they were filming, I was down by the ticket car, which would be the west end of the area that we had marked out for tours.

Q. On any of those occasions when you saw Hoa Van and Ty Van videotaping you, did you have occasion to speak with either of them?

A. Yeah, I spoke to Ty off and on, nothing of any consequence. Hoa wouldn’t hardly talk to me at all, just absolutely stony silence, and I tried to ask her one time—

Q. Do you remember when this was?

A. I think it was around the 20th, like the second weekend or so after Labor Day, I believe it was.

Q. This is what month now?

A. September.

Q. Yes.

A. Late September, early October. She came around the front of the ticket car, and that’s where I handing out leaflets, and I said good morning or something and she just walked right on by me. And I said, “Hoa, why won’t you even talk to me?” And she just kept walking and I started to walk towards her trying to say something and I realized she was talking to me, but she was facing away from me. And she walked over to the tick-

et car and she was doing something with the clipboard, which is what the dispatcher uses.

Undoubtedly, Buckey would have been in a position to observe such activities considerably before the time he pinpoints if they occurred on a regular basis. Thus, Ty Van's written record (R. Exh. 13) reflects Buckey's name among the pier 41 handbillers on 16 days from July 12 through the Labor Day weekend. And Buckey's repeated references to September in his testimony strongly suggests that he had not confused the Labor Day weekend with the Independence Day weekend while testifying.

Others testified concerning the identity of Respondent's employees, supervisors and managers who took photographs and videotaped at pier 41. However, these others made only vague references, if any at all, to the timing of this activity.

B. *Conclusions*

Notwithstanding my regard for Michael Buckey as one of the more reliable witnesses in this case, I find on the basis of the testimony by Gleffe and McKenzie that at least some photographing or videotaping occurred as early as July. However, I am unable to conclude on the basis of their testimony or any other evidence that any photographing or videotaping occurred over the July 4th weekend. In this connection, Jonathan Palewicz's assertion that the photographing and videotaping occurred almost the "almost the entire sum-

mer" strongly suggests that it did not occur over that first weekend of the boycott. I further find no reliable evidence supports the General Counsel's assertion that the photographing and videotaping commenced on July 2 when the pier 41 boycott activities commenced.

Summary of Findings

Summarizing, I make the following findings as requested by the Board: (1) Respondent maintained a written list of the boycotters who appeared at pier 41 commencing on July 2; (2) Misconduct on the part of the boycotters occurred over the July 4th weekend; (3) Respondent commenced photographing and videotaping the boycotters activities at pier 41 at sometime in July but after the July 4th weekend; and (4) Respondent knew of the misconduct of the boycotters—especially the impeding of access to the ticket window and the unauthorized boarding of the tour cars—before it ordered the photographing and videotaping. On the basis of these findings, I conclude that it is unnecessary to revise my earlier recommended Order as to the General Counsel's surveillance allegation in complaint paragraph 12.⁸

⁸If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.